

such statement is read or admitted into evidence, the witness shall deliver a copy of the statement to the Presiding Officer, the reporter, and opposing counsel. The witness presenting the statement shall swear to or affirm the statement and shall be subject to appropriate oral cross-examination upon the contents thereof.

(d) *Admission of affidavits where the witness is unavailable.* The Presiding Officer may admit into evidence affidavits of witnesses who are unavailable. The term “unavailable” shall have the meaning accorded to it by Rule 804(a) of the Federal Rules of Evidence.

(e) *Exhibits.* Where practicable, an original and one copy of each exhibit shall be filed with the Presiding Officer for the record and a copy shall be furnished to each party. A true copy of any exhibit may be substituted for the original.

(f) *Official notice.* Official notice may be taken of any matter judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.

§ 22.23 Objections and offers of proof.

(a) *Objection.* Any objection concerning the conduct of the hearing may be stated orally or in writing during the hearing. The party raising the objection must supply a short statement of its grounds. The ruling by the Presiding Officer on any objection and the reasons given for it shall be part of the record. An exception to each objection overruled shall be automatic and is not waived by further participation in the hearing.

(b) *Offer of proof.* Whenever evidence is excluded from the record, the party offering the evidence may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the evidence excluded. The offer of proof for excluded documents or exhibits shall consist of the insertion in the record of the documents or exhibits excluded. Where the Environmental Appeals Board decides that the ruling of the Presiding Officer in excluding the

evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5325, Feb. 13, 1992]

§ 22.24 Burden of presentation; burden of persuasion.

The complainant has the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed civil penalty, revocation, or suspension, as the case may be, is appropriate. Following the establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the complaint. Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence.

§ 22.25 Filing the transcript.

The hearing shall be transcribed verbatim. Promptly following the taking of the last evidence, the reporter shall transmit to the Regional Hearing Clerk the original and as many copies of the transcript of testimony as are called for in the reporter's contract with the Agency, and also shall transmit to the Presiding Officer a copy of the transcript. A certificate of service shall accompany each copy of the transcript. The Regional Hearing Clerk shall notify all parties of the availability of the transcript and shall furnish the parties with a copy of the transcript upon payment of the cost of reproduction, unless a party can show that the cost is unduly burdensome. Any person not a party to the proceeding may receive a copy of the transcript upon payment of the reproduction fee, except for those parts of the transcript order to be kept confidential by the Presiding Officer.

§ 22.26 Proposed findings, conclusions, and order.

Within twenty (20) days after the parties are notified of the availability of the transcript, or within such longer time as may be fixed by the Presiding Officer, any party may submit for the consideration of the Presiding Officer, proposed findings of fact, conclusions of law, and a proposed order, together

with briefs in support thereof. The Presiding Officer shall set a time by which reply briefs must be submitted. All submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

Subpart E—Initial Decision and Motion To Reopen a Hearing

§ 22.27 Initial decision.

(a) *Filing and contents.* The Presiding Officer shall issue and file with the Regional Hearing Clerk his initial decision as soon as practicable after the period for filing reply briefs under § 22.26 has expired. The Presiding Officer shall retain a copy of the complaint in the duplicate file. The initial decision shall contain his findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefor, a recommended civil penalty assessment, if appropriate, and a proposed final order. Upon receipt of an initial decision, the Regional Hearing Clerk shall forward a copy to all parties, and shall send the original, along with the record of the proceeding, to the Hearing Clerk. The Hearing Clerk shall forward a copy of the initial decision to the Environmental Appeals Board.

(b) *Amount of civil penalty.* If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. The Presiding Officer shall not raise a penalty from that recommended to be assessed in the complaint if the respondent has defaulted.

(c) *Effect of initial decision.* The initial decision of the Presiding Officer shall become the final order of the Environmental Appeals Board within forty-five

(45) days after its service upon the parties and without further proceedings unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to the proceedings, or (2) the Environmental Appeals Board elects, sua sponte, to review the initial decision.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5325, Feb. 13, 1992]

§ 22.28 Motion to reopen a hearing.

(a) *Filing and content.* A motion to reopen a hearing to take further evidence must be made no later than twenty (20) days after service of the initial decision on the parties and shall (1) state the specific grounds upon which relief is sought, (2) state briefly the nature and purpose of the evidence to be adduced, (3) show that such evidence is not cumulative, and (4) show good cause why such evidence was not adduced at the hearing. The motion shall be made to the Presiding Officer and filed with the Regional Hearing Clerk.

(b) *Disposition of motion to reopen a hearing.* Within ten (10) days following the service of a motion to reopen a hearing, any other party to the proceeding may file with the Regional Hearing Clerk and serve on all other parties an answer thereto. The Presiding Officer shall announce his intent to grant or deny such motion as soon as practicable thereafter. The conduct of any proceeding which may be required as a result of the granting of any motion allowed in this section shall be governed by the provisions of the applicable sections of these rules. The filing of a motion to reopen a hearing shall automatically stay the running of all time periods specified under these Rules until such time as the motion is denied or the reopened hearing is concluded.

Subpart F—Appeals and Administrative Review

§ 22.29 Appeal from or review of interlocutory orders or rulings.

(a) *Request for interlocutory appeal.* Except as provided in this section, appeals to the Environmental Appeals Board shall obtain as a matter of right